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MAR 12 1984

IN THE
SUPREME COURT OF THE UNITED STATES

ALEXANDER L. STEVENS
CLERK

OCTOBER TERM, 1983

NO. _____

IN RE GRAND JURY PROCEEDINGS:

DONALD FERGUSON,
JOSEPH FERGUSON,

PETITIONERS,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Attorney for Petitioners
DONALD FERGUSON
JOSEPH FERGUSON

QUESTIONS PRESENTED FOR REVIEW

I

Whether the civil contempt Order should be set aside when there is no longer any valid proceeding at which the Petitioners can be compelled to testify in that the Statute of Limitations for the offense under investigation has expired.

II

Whether the civil contempt Order should be vacated in that the testimony of the Petitioners is no longer "necessary to the public interest" and any further confinement would exceed the life of "the Court proceedings."

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NO. _____

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1983

IN RE GRAND JURY PROCEEDINGS:

DONALD FERGUSON,
JOSEPH FERGUSON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The Petitioners, Donald Ferguson and Joseph Ferguson, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on December 5, 1983.

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit entered its Memorandum Opinion affirming the District Court Orders adjudging the Petitioners Donald and Joseph Ferguson in civil contempt on December 5, 1983. The Memorandum Opinion was deemed "Not For Publication." A copy of the Memorandum is attached as Appendix "A". On February 10, 1984, an Order was entered denying a Petition for Rehearing and Suggestion for Rehearing en banc. A copy of the Order is attached as Appendix "B".

JURISDICTIONAL GROUNDS

On December 5, 1983, the United States Court of Appeals for the Ninth Circuit entered a Memorandum Opinion affirming the Order of the United States District Court for the Southern District of California adjudging Petitioners

Donald and Joseph Ferguson in civil contempt. A Petition for Rehearing and Suggestion for Rehearing en banc was denied on February 10, 1984.

The jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment, United States

Constitution:

No person ... shall be compelled in any criminal case to be a witness against himself ...

STATUTORY PROVISIONS INVOLVED

Title 18 U.S.C. §3282:

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

Title 18 U.S.C. §6003:

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a Court of the United States or a Grand Jury

of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in Section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistance Attorney General request an order under subsection (a) of this section when in his judgment --

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

STATEMENT OF THE CASE

I

On October 26, 1978, a robbery was committed aboard the U.S.S. Dixon, a submarine tender, which was then berthed at the Navy submarine base in San Diego, California, and approximately one hundred ninety thousand (\$190,000.00) in currency was stolen by two or three individuals. Sometime later, a federal grand jury was convened in the Southern District of California to commence investigation of the robbery.

Petitioners Donald and Joseph Ferguson were subpoenaed by the United States Attorney for the Southern District of California to testify before this grand jury. Counsel for Petitioners were informed that Donald and Joseph Ferguson were targets of the federal grand jury investigation into the robbery of the U.S.S. Dixon.

On October 12, 1983, the Honorable Gordon Thompson, Jr., United States District Court Judge, entered Orders compelling testimony with regard to the Petitioners. These Orders were issued pursuant to 18 U.S.C. §6002 and only became effective once the Petitioners refused to testify on the basis of their Fifth Amendment privilege against self-incrimination.

On October 24, 1983, Petitioners appeared before the United States District Court and, after having raised certain objections to providing testimony before the grand jury for the Southern District of California, were ordered by the District Court to return the next day and provide testimony. On the following day, October 25, 1983, Petitioners appeared before the grand jury for the Southern District of California and

maintained their objections to testifying based upon their Fifth Amendment privilege against self-incrimination and, also, alleged improper abuse of the grand jury.

On that same day, Petitioners appeared before the United States District Court after refusing to testify before the grand jury and were held in civil contempt pursuant to Title 28 U.S.C. §1826(a) and were committed to the custody of the attorney general until they purged their contempt by testifying or until the expiration of the grand jury.

At midnight on October 26, 1983, the five (5) year Statute of Limitations with regard to the robbery of the U.S.S. Dixon expired. Title 18 U.S.C. §3282. On October 27, 1983, Petitioners filed a Motion before the United States District

Court moving to set aside the civil contempt Order based on the expiration of the Statute of Limitations with regard to the offense under investigation. On October 28, 1983, Petitioners appeared before the District Court, a hearing was conducted, and said Motions were denied. Both Petitioners were then released on bond pending exhaustion of their appellate remedies.

II

On December 5, 1983, the United States Court of Appeals for the Ninth Circuit affirmed the Order entered by the United States District Court adjudging Petitioners in civil contempt. The Court's Opinion was in memorandum form and consisted of one sentence, without analysis or legal citation. (See Appendix "A").

On February 10, 1984, the Ninth Circuit Court of Appeals denied Petitioners' Petition for Rehearing and Suggestion for Rehearing en banc. (See Appendix "B").

REASONS FOR GRANTING THE WRIT

I

The Failure of the Ninth Circuit to Set Aside Petitioners' Civil Contempt Orders, Entered By the District Court After Their Refusal to Testify Before a United States Grand Jury Which Was Investigating an Offense for Which the Statute of Limitations Had Terminated, is Unprecedented and Erroneously Expands the Function and Investigative Powers of Federal Grand Juries Thereby Requiring the Exercise of This Court's Supervisory Powers.

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The purpose of a Grand Jury inquiry is to obtain information about criminal activities in order to determine whether to return an Indictment and launch a criminal proceeding. United States v. Halderman, 559 F.2d 31, 95 (D.C. Cir. 1976), cert.den., sub nom., Ehrlichman v. United States and Mitchell v. United States, 431 U.S. 933, 97 S.Ct. 2641 (1977). Indeed, the investigative function of the Grand Jury is carried out with the specific purpose of determining whether probable cause exists to institute criminal prosecutions. Boron v. United States, 449 F.2d 933, 939 (9th Cir. 1971).

In order to facilitate this investigative function, the Grand Jury has the power to summon all the information it deems necessary to fulfill its investigatory obligation and such

power is limited only to the reasonable specificity that fundamental due process requires. In Re Grand Jury Proceedings, 73 F.R.D. 647, 651 (M.D. Fla. 1977), and cases cited therein. The summoning of witnesses to attend and give testimony before the Grand Jury is by far the most common investigative tool utilized. Absent the claim of privilege, it is the duty of every citizen to appear and give evidence before the Grand Jury. United States v. Dionisio, 410 U.S. 1, 9, 93 S.Ct. 764, 769 (1973). A witness called before a Grand Jury may be held in-contempt if he refuses "without just cause" to testify. 28 U.S.C. Section 1826; In Re Grand Jury Proceedings, 662 F.2d 532, 533 (9th Cir. 1981). Such a situation arises when a witness refuses to testify before a Grand Jury after having been granted use immunity pursuant

to 18 U.S.C. Section 6002. If, after having been granted immunity, the witness still refuses to testify, a District Court, under the authority of 28 U.S.C. Section 1826(a), can hold the witness in civil contempt and order his confinement "until such time as the witness is willing to give such testimony or provide such information".

Civil contempt, as opposed to criminal contempt, is a remedial sanction used to obtain compliance with a Court Order or to compensate for damage sustained as a result of noncompliance. Criminal contempt, on the other hand, is to punish intentional misconduct, and the procedural safeguards that attend any criminal proceeding come into play.

United States v. Asay, 614 F.2d 655, 659 (9th Cir. 1980); see also Shillitani v. United States, 384 U.S. 364, 86 S.Ct.

1531 (1966); McComb v. Jacksonville Paper Co., 333 U.S. 187, 69 S.Ct. 497 (1949). Being remedial, a party always has the ability to purge a civil contempt by simply complying with the Court's orders. Shillitani v. United States, supra, 382 at 370-371, 86 S.Ct. at 1535; In Re Stewart, 571 F.2d 958, 963 (5th Cir. 1978); United States v. Spectro Foods, Corp., 544 F.2d 1175, 1182 (3rd Cir. 1976). In other words, under civil contempt, the contemnor carries the key to the prison, or the ticket to nullify any monetary fines, in his own pocket. Southern Ry. Co. v. Lanham, 403 F.2d 119, 125 (5th Cir. 1968).

The power to impose coercive imprisonment in a civil contempt proceeding, however, is limited by the individual's ability to comply with the Court's Order. Thus, when the Grand Jury

is discharged, confinement for civil contempt must terminate because the possibility of compliance has ended.

Shillitani v. United States, supra, 384 U.S. 364, 371, 86 S.Ct. 1531, 1536; United States v. Petito, 671 F.2d 68, 72 (2nd Cir. 1982). Stated another way, a civil contempt proceeding abates when the proceeding out of which it arose has terminated. Backo v. Local 281, United Broth. of Carpenters and Joiners of America, 438 F.2d 176, 182 (2nd Cir. 1970), cert.den., 404 U.S. 858, 92 S.Ct. 110 (1971).

Such is precisely the situation in the case at bar. Due to the running of the Statute of Limitations, the Grand Jury investigation into the robbery of the U.S.S. Dixon is, for all practical purposes, over. There being no authorized proceeding, therefore, that

the Fergusons could now testify before
the civil contempt must be set aside.

II

The Ninth Circuit Affirmance of the
District Court's Refusal to Consider the
Validity of its Civil Contempt Order,
After the "Public Necessity" that Allowed
the Original Grant of Immunity to
Petitioners Was Negated by the Running of
the Statute of Limitations, is in
Conflict With the Holding of the Second
Circuit in United States v. Handler, 476
F.2d 709 (2nd Cir. 1973).

Donald and Joseph Ferguson have
presently been held in civil contempt,
and ordered confined, because of their
failure to provide testimony to a Grand
Jury regarding a crime for which the
Statute of Limitations has now run. Any
further confinement of the Fergusons will
violate the letter and the spirit of the

statutes which allow for the obtaining of
use immunity (18 U.S.C. Section 6003) and
for the incarceration of a recalcitrant
witness who refuses to testify (28 U.S.C.
Section 1826).

In this cause, the United States
Attorney requested an Order from the
Court requiring the Fergusons to "give
testimony or provide other information
which (they refuse) to give or provide on
the basis of (their) privilege against
self-incrimination..." pursuant to 18
U.S.C. Section 6003(a). Pursuant to 18
U.S.C. Section 6003(b):

"A United States
Attorney may, with the
approval of the Attorney
General, the Deputy Attorney
General, or any designated
assistant Attorney General,
request an Order under
subsection (a) of this
section when in his judgment
--

- (1) The testimony or
other information from such

individual may be necessary
to the public interest; and

(2) Such individual has
refused or is likely to
refuse to testify or provide
other information on the
basis of his privilege
against self-incrimination."

(Emphasis supplied.)

In this proceeding, the testimony of the Fergusons is no longer "necessary to the public interest" in that the Grand Jury can no longer indict anyone for the robbery of the U.S.S. Dixon. The District Court agreed that an application under 18 U.S.C. Section 6003 would not be approved by the Attorney General today because of the running of the Statute of Limitations. (R.T. 5; Proceedings of October 28, 1983). However, the Court did not feel this lack of "public interest" at this time would have any effect on its contempt Order, nor did the Court feel it had any obligation or ability to re-evaluate the viability or validity of the contempt Orders once the Statute of Limitations had run.

However, there is authority for the fact that the cessation of the "public necessity" that led to the grant of immunity extinguishes any contempt Order.

In United States v. Handler, 476 F.2d 709 (2nd Cir. 1973) the Court noted:

"In ruling as we do, we emphasize at the same time the remedial nature of Handler's confinement. The importance of that fact is the recognition of Handler's continuing right to petition the District Court for release if it appears that he is no longer able to comply with the Order to testify or [if the public necessity that led to the grant of immunity and the Order to testify should cease to exist."] Id. at 715, fn. 7. (Emphasis supplied.)

In this cause, there is no longer any public necessity which led to the original grant of immunity, in that the Statute of Limitations has run and no

Indictment can be returned. Therefore, any further confinement would become punitive rather than civil in nature. Due to the lack of "public necessity" at this time, the civil contempt Orders should be set aside.

Pursuant to Title 28 U.S.C. Section 1826(a), a recalcitrant witness, who refuses to testify after having been granted immunity, may be ordered confined. However, "no period of such confinement shall exceed the life of -- (1) the Court proceeding, or (2) the term of the Grand Jury, including extensions..."

Although counsel for the Petitioners has found no controlling authority, it would appear to violate the spirit of 28 U.S.C. Section 1826(a) to confine an individual who has refused to testify when there can no longer be any

"court proceeding". The Statute of Limitations ran at midnight on October 26, 1983, with no Indictment having been returned. The Petitioners take the position that the "court proceeding" with regard to the robbery of the U.S.S. Dixon has terminated for the purpose of civil confinement in that it is impossible for an individual to ever testify at such a court proceeding in the future.

CONCLUSION

For the foregoing reasons, Petitioners Donald and Joseph Ferguson pray that a Writ of Certiorari issue to review the ruling of the United States Court of Appeals for the Ninth Circuit to resolve the questions presented herein.

Respectfully submitted,

Frank T. Vecchione

FRANK T. VECCHIONE
Attorney for Petitioners
DONALD FERGUSON
JOSEPH FERGUSON

PROOF OF SERVICE

I, BONNIE WHITEHALL, do hereby
state:

I am a citizen of the United States,
over the age of 18 years, and not a party
to the within action.

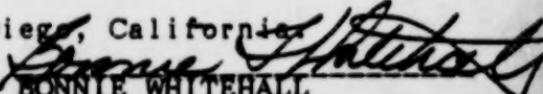
My business address is 108 Ivy
Street, San Diego, California, 92101.

On March 9, 1984, I placed in an
envelope, with postage prepaid, a copy
of: PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT addressed to the
following individual:

The Honorable Rex E. Lee
Solicitor General of the United
States
Department of Justice
Washington, D.C. 20530
and thereafter placed same in the United
States mail at San Diego, California.

I declare, under penalty of perjury,
that the foregoing is true and correct.

Executed this 9th day of March,
1984, at San Diego, California.


BONNIE WHITEHALL

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE GRAND JURY PROCEEDINGS,)
STUART A. LESTER, and DONALD)
FERGUSON,)
Witness/Appellants,)
v.)
UNITED STATES OF AMERICA,)
Appellee.)

IN RE GRAND JURY PROCEEDINGS,)
JOSEPH FERGUSON,)
Witness/Appellant,)
v.)
UNITED STATES OF AMERICA,)
Appellee.)

Nos. 83-6354, 6360

DC Nos. CR 83-96 MISC, CR 83-97 MISC

MEMORANDUM

Appeal from the United States
District Court for the Southern
District of California
Hon. Leland C. Nielsen, Presiding

Submitted November 28, 1983

Before: ANDERSON, TANG and SKOPIL,
Circuit Judges

The district court's orders of October 26, 1983, adjudging Appellants Donald and Joseph Ferguson in civil contempt are affirmed. The order holding Appellant Stuart Lester in contempt, however, is vacated and the cause remanded to district court.

The name of the client and the nature of the attorney's fee arrangements with the client are not normally confidential communications protected by the attorney-client privilege. See In re Michaelson, 511 F.2d 882, 889 (9th Cir. 1975). The identity of the client and the nature of the fee arrangements are privileged, however, when the person invoking the privilege can demonstrate a strong probability that disclosure would implicate the client in the very criminal activity for which advice was sought. See United States v. Hodge and Zweig, 548

F.2d 1347, 1353 (9th Cir. 1977); Baird v. Koerner, 279 F2d., 630-32 (9th Cir. 1960). The attorney-client privilege is applicable in such a situation because disclosure would reveal information that is normally privileged, e.g., the client's motive in seeking legal advice. See Baird v. Koerner, 279 F.2d at 632; In re Grand Jury Proceedings (Jones), 517 F.2d 666, 672 (5th Cir. 1975).

Upon remand Lester can be required to disclose whether or not he represents the Fergusons. The fact that an individual sought legal advice, without more, is not incriminating. Moreover, if Lester does represent the Fergusons, he must divulge the nature of the fee arrangements he entered into with them.

Lester need not, however, reveal the name of the client who sought his advice in November 1978 concerning the robbery

of the U.S.S. Dixon. Disclosure of the client's name would implicate the client in the robbery and might provide "the link that could form the chain of testimony necessary to convict [the client] of a federal crime." Baird v. Koerner, 279 F.2d at 633. In addition, disclosure of the client's identity would reveal the client's motive for seeking legal advice. Id. at 632; Jones, 517 F.2d at 672.

Appeals nos. 83-6354 and 83-6360 are AFFIRMED.

Appeal no. 83-6353 is REVERSED and REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE GRAND JURY PROCEEDINGS,)
STUART A. LESTER, and DONALD)
FERGUSON,)

Witness/Appellants,)

v.)

UNITED STATES OF AMERICA,)

Appellee.)

IN RE GRAND JURY PROCEEDINGS,)
JOSEPH FERGUSON,)

Witness/Appellant,)

v.)

UNITED STATES OF AMERICA,)

Appellee.)

Nos. 83-6354, 6360

DC Nos. CR 83-96 MISC, CR 83-97 MISC

ORDER

Before: ANDERSON, TANG and SKOPIL,
Circuit Judges

Appellant's petition for rehearing
or rehearing en banc is denied.

1/23/84SP
(CR CAL 11/7/83)

FILED

MAR 24 1984

ALEXANDER STEVENS
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES OF AMERICA
OCTOBER TERM, 1983

NO. 83-1510

IN RE GRAND JURY PROCEEDINGS:

DONALD FERGUSON,
JOSEPH FERGUSON,

PETITIONERS,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

SUPPLEMENTAL APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Attorneys for Plaintiff
United States of America

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

IN RE:) Grand Jury No.
GRAND JURY) 83-096
PROCEEDINGS OF)
DONALD FERGUSON) ORDER ADJUDGING
-----) GRAND JURY
) WITNESS IN
) CONTEMPT

Filed by Clerk, U.S. District Court

Southern District of California

on October 27, 1983

IT IS HEREBY ORDERED that the
October 25, 1983 order of this court is
hereby incorporated herein by reference;

On October 25, 1983, the United States of America made application to this court for an order adjudging witness Donald Ferguson to be held in civil contempt of court for refusing without just cause to answer questions and provide testimony before a federal grand jury on October 13, 1983 (by stipulation), and again on October 25, 1983;

On October 25, 1983, at approximately 2:30 p.m., witness Donald Ferguson and his counsel, Frank T. Vecchione, appeared before this court pursuant to the United States' application for civil contempt; Attorney Frank T. Vecchione acknowledged that his client, Donald Ferguson, had refused to answer questions propounded by the prosecutor before the grand jury that morning;

IT IS HEREBY ORDERED that the witness Donald Ferguson is hereby adjudged in civil contempt of this court pursuant to Title 28, United States Code, Section 1826(a) for his refusal to answer questions before the federal grand jury for the Southern District of California on October 13, 1983 (by stipulation) and again on October 25, 1983;

IT IS FURTHER ORDERED that the witness, Donald Ferguson, be committed to the custody of the Attorney General, or his authorized representative, for imprisonment until such time as he is willing to comply with the court's order by answering questions before the grand jury, or for the term of the present grand jury, No. 83-1, that is, until May 1, 1984, which is the scheduled termination date of said grand jury;

IT IS FURTHER ORDERED that the application of witness Donald Ferguson for a stay of this court's order is hereby denied. 10-26-83

/S/ LELAND C. NIELSEN
UNITED STATES DISTRICT
JUDGE

PETER K. NUNEZ
United States Attorney
HERBERT B. HOFFMAN
Assistant U.S. Attorney
United States Courthouse
940 Front Street, Room 5-N-19
San Diego, California 92189
Telephone: (619) 293-6529

Attorneys for Plaintiff
United States of America

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

IN RE:) Grand Jury No.
GRAND JURY) 83-097
PROCEEDINGS OF) ORDER ADJUDGING
JOSEPH FERGUSON) GRAND JURY
) WITNESS IN
) CONTEMPT

Filed by Clerk, U.S. District Court
Southern District of California
on October 27, 1983

IT IS HEREBY ORDERED that the
October 25, 1983 order of this court is
hereby incorporated herein by reference;

On October 25, 1983, the United States of America made application to this court for an order adjudging witness Joseph Ferguson to be held in civil contempt of court for refusing without just cause to answer questions and provide testimony before a federal grand jury on October 13, 1983, and again on October 25, 1983;

On October 25, 1983, at approximately 2:30 p.m., witness Joseph Ferguson and his counsel, Sheldon Sherman, appeared before this court pursuant to the United States' application for civil contempt; Attorney Sheldon Sherman acknowledged that his client, Joseph Ferguson, had refused to answer questions propounded by the prosecutor before the grand jury that morning;

IT IS HEREBY ORDERED that the witness Joseph Ferguson is hereby adjudged in civil contempt of this court pursuant to Title 28, United States Code, Section 1826(a) for his refusal to answer questions before the federal grand jury for the Southern District of California on October 13, and 25, 1983;

IT IS FURTHER ORDERED that the witness, Joseph Ferguson, be committed to the custody of the Attorney General, or his authorized representative, for imprisonment until such time as he is willing to comply with the court's order by answering questions before the grand jury, or for the term of the present grand jury, No. 83-1, that is, until May 1, 1984, which is the scheduled termination date of said grand jury;

IT IS FURTHER ORDERED that the application of witness Joseph Ferguson

for a stay of this court's order is
hereby denied. 10-26-83

/S/ LELAND C. NIELSEN
UNITED STATES DISTRICT
JUDGE

PROOF OF SERVICE

I, BONNIE WHITEHALL, do hereby state:

I am a citizen of the United States, over the age of 18 years, and not a party to the within action.

My business address is 108 Ivy Street, San Diego, California, 92101.

On March 22, 1984, I placed in an envelope, with postage prepaid, a copy of: SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT addressed to the following individual:

The Honorable Rex E. Lee
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530
and thereafter placed same in the United States mail at San Diego, California.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed this 22nd day of March, 1984, at San Diego, California.


BONNIE WHITEHALL

FILED

MAY 23 1984

No. 83-1510

ALEXANDER L. STEVENS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

DONALD FERGUSON & JOSEPH FERGUSON, PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION

REX E. LEE

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1510

DONALD FERGUSON & JOSEPH FERGUSON, PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners claim that the orders holding them in civil contempt for refusing to testify before the grand jury must be set aside because the statute of limitations has since run on the offense that was the principal subject of the grand jury's investigation.

1. On October 26, 1978, the disbursing officer on the *U.S.S. Dixon*, a submarine tender that was berthed in San Diego, California, was assaulted and some \$197,000 in currency was stolen from the ship's safes (C.A. App. 62).¹ In June 1981, the Federal Bureau of Investigation received information from a confidential informant that implicated petitioners and two others, Terry Lee Smith and Stuart

¹"C.A. App." refers to Appellee's Supplemental Excerpt of Clerk's Record filed in the court of appeals.

Lester, as the robbers. In April 1982, a second informant gave more detailed information concerning the same suspects (*ibid.*).

In July 1982, all four men, responding to subpoenas issued by a federal grand jury in the Southern District of California, agreed to be photographed and fingerprinted by the FBI and to furnish hair samples (*ibid.*). On October 3, 1983, additional grand jury subpoenas were served upon the four men, specifically calling for them to appear before the grand jury in order to testify. On October 12, 1983, the United States District Court for the Southern District of California issued orders granting use immunity to the witnesses and compelling their testimony, pursuant to 18 U.S.C. 6001 *et seq.* (C.A. App. I-21). Notwithstanding the court's order, petitioners refused to testify and they were subsequently held in civil contempt (Pet. Supp. App. I-4, 5-8).²

On October 27, 1983, petitioners moved to quash the contempt orders on the ground that the statute of limitations had expired for the offense under investigation (C.A. App. 104-108). The district court denied the motions, and the court of appeals affirmed by order (Pet. App. 22-25).

2. Petitioners claim (Pet. 9-20) that the orders holding them in civil contempt must be vacated because the running of the statute of limitations with regard to the crime of robbing the *U.S.S. Dixon* has effectively terminated the grand jury investigation, and with it, any further public necessity for their testimony. Recognizing that no court has ever endorsed this novel assertion, petitioners rely on cases holding that once the grand jury has been discharged, a

²Stuart Lester also refused to testify, despite a grant of immunity, based on his assertion of an attorney-client privilege. Lester was held in contempt, but the court of appeals reversed his conviction (Pet. App. 23-25).

judgment of civil contempt must be vacated because the contemnor has lost the power to purge himself of contempt by complying with the court's order to testify. *Shillitani v. United States*, 384 U.S. 364, 371-372 (1966); *United States v. Petito*, 671 F.2d 68, 72 (2d Cir. 1982); *United States v. Handler*, 476 F.2d 709, 715 n.7 (2d Cir. 1973); *Backo v. Local 281, United Bhd. of Carpenters*, 438 F.2d 176, 182 (2d Cir. 1970), cert. denied, 404 U.S. 858 (1971). By analogy to these cases, petitioners argue that the running of the statute of limitations has terminated the authority of the grand jury to investigate the robbery of the U.S.S. DIXON, and therefore that their testimony may no longer be compelled.

Petitioners' attempt to limit the authority of a continuing grand jury is flatly inconsistent with the scope of the grand jury's power as repeatedly recognized by this Court. See *United States v. Mandujano*, 425 U.S. 564, 571 (1976); *United States v. Calandra*, 414 U.S. 338, 344 (1974); *Branzburg v. Hayes*, 408 U.S. 665, 700 (1972); *Costello v. United States*, 350 U.S. 359, 362 (1956).³ This is not a

³In *United States v. Calandra*, 414 U.S. at 343, the Court reaffirmed the breadth of the grand jury's power:

The grand jury may compel the production of evidence or the testimony of witnesses as it considers appropriate, and its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials. "It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime." *Blair v. United States*, 250 U.S. 273, 282 (1919).

* * * * *

Furthermore, a witness may not interfere with the course of the grand jury's inquiry. He "is not entitled to urge objections of incompetency or irrelevancy, such as a party might raise, for this is

case like those cited by petitioners in which the grand jury has been discharged and its duties actually ended. Here the grand jury is still in session⁴ and is therefore still empowered to continue its investigation into the "broader problems of concern to society." *United States v. Mandujano*, 425 U.S. at 573.

The grand jury's inquiry is not at a close merely because the statute of limitations has run on the robbery offense. The grand jury is entitled to pursue every available clue and examine every witness in order to determine whether any additional crimes have been committed with respect to the events surrounding the robbery of the *U.S.S. Dixon*. *Branzburg v. Hayes*, 408 U.S. at 701. For example, it may well be that the robbers failed to declare or pay the required income tax on the money stolen from the *U.S.S. Dixon*. The statute of limitations on tax violations is six years and has therefore not yet run. 26 U.S.C. 6531. Similarly, the robbery might have been part of a broader conspiracy or scheme that continued after the robbery. The statute of limitations would not begin to run until the conspiracy or scheme terminated. *Grunewald v. United States*, 353 U.S. 391, 397 (1957); *United States v. Kissel*, 218 U.S. 601 (1910); *United States v. Walker*, 653 F.2d 1343, 1345-1350 (9th Cir. 1981), cert. denied, 455 U.S. 908 (1982). It is therefore clear that the grand jury has a continuing power and obligation to investigate the events surrounding the robbery of the *U.S.S. Dixon*. Accordingly, there exists a continuing "public interest" in having petitioners testify

no concern of his." *Id.* at 282. Nor is he entitled "to challenge the authority of the court or of the grand jury" or "to set limits to the investigation that the grand jury may conduct." *Ibid.*

⁴The term of this particular grand jury has been exended until November 1984.

before the grand jury, and petitioners are still capable of complying with the district court's order by testifying. Accordingly, they are still in contempt of the court's order.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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